No. 464

In the Supreme Court of the United States

October Term, 1961

National Labor Relations Board, petitioner

v.

Washington Aluminum Company

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

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[illegible]
[illegible]
[illegible]
Attorneys,
National Labor Relations Board,
Washington 25, D.C.

INDEX

CITATIONS

Cases:

Cases—Continued

Cases—Continued

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (R. 108–125), is reported at 291 F. 2d 869. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 2–23) are reported at 126 NLRB 1410 and 128 NLRB 643.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1961 (R. 126–127). On August 30, 1961, Mr. Justice Black entered an order extending the time for filing a petition for a writ of certiorari to and including October 2, 1961 (R. 128). The petition was filed on October 2, 1961, and was granted on December 4, 1961 (R. 129; 368 U.S. 924). The juris-

diction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether employees who walk out in concert to protest objectionable working conditions, without first affording the employer a fresh opportunity to correct them, must be denied the protection which Section 7 of the National Labor Relations Act affords to those who engage in "concerted activities."

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act and the Labor Management Relations Act are set forth in the Appendix, *infra*, pp. 29–31.

STATEMENT

A. The Board's findings of fact

The day shift in respondent's machine shop[1] consisted of nine men—a foreman and eight machinists (R. 13; 26, 33).[2] Heating for the shop was supplied primarily from an oil-fired furnace (R. 14; 51–52). In addition, the shop contained two gas-fired space heaters of much smaller heating capacity (R. 50). Ordinarily, the furnace was shut down at night and on week ends (R. 14; 61), but in severe cold weather the night watchman was instructed "to turn on all the heaters at regular intervals to protect and main-

[1] Respondent is engaged in the fabrication of aluminum products.

[2] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

tain above-freezing condition in the buildings" (R. 15; 61). The shop itself was not insulated (R. 38) and had a number of doors to the outside which were opened and closed frequently during working hours (R. 38, 50).

At various times prior to January 5, 1959, employees in the machine shop had complained to company officials about the cold in the shop during winter months (R. 2-3). Thus, one employee had frequently spoken to the president of the company and other officials about the coldness of the shop (R. 32). Another employee had, "on several of the cold mornings," complained to the foreman, Jarvis, about the insufficient heat coming from the large furnace (R. 35-36). Another employee testified that "on cold days * * * a lot of men worked with their heavy sweaters on or jackets" (R. 26), and that, just two weeks prior to the events described below, all the men had complained to Jarvis about the "cold and miserable" conditions existing in the shop at that time (R. 26, 89).

On the morning of January 5, because of a cold spell and the inability of the watchman to start the furnace, employees coming to work found the machine shop to be very cold (R. 3, 12-15; 32-33, 48-49, 51, 89).[1] One employee noticed that an icicle had formed in the drainpipe of the spot welder which he operated (R. 35). When Caron, another employee, arrived, he went into the foreman's office to get warm,

[1] The average temperature that day was 17 degrees above zero, which was 18 degrees below the normal for that date (R. 87).

as was his custom, but on this morning the office was no warmer than the rest of the shop (R. 12; 27). Caron and Foreman Jarvis discussed the coldness in the building, and then, when "a couple of the fellows walked by * * * huddled," the foreman told Caron, "If those fellows had any guts at all, they would go home" (R. 13; 27, 30).

At 7:30 a.m., the work buzzer sounded, and Caron walked into the machine shop. A group of employees, who were usually working by this time, remained "all huddled there, shaking a little, cold." Caron said to them, "Well, Dave [Jarvis] told me if we had any guts, we would go home * * *. I am going home, it is too damned cold to work" (R. 13; 28, 30). Caron then asked the men what they were going to do. The employees started talking among themselves, saying, "Well, let's go." As Caron started out of the plant, the others followed behind him (R. 13; 30, 90, 93). According to one employee's testimony, the employees had "said it was extremely cold. And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way" (R. 3; 43–44). As Caron was leaving, he saw Jarvis and said, "Dave, it is too cold, I am going home" (R. 13; 28, 91).

When Arthur Wampler, the general foreman, arrived at the plant between 7:45 and 8:00 in the morning, Jarvis informed him that all but one of the men had walked out because it was too cold (R. 61). They then obtained two employees from other shops in the

plant and put them to work in the machine shop (R. 61).[4]

Fred Rushton, respondent's president, arrived at about 8:20 a.m. (R. 15–16; 65). Seeing no one in the machine shop, Rushton said, "We can't have that, Dave * * *. If they have all gone, we are going to terminate them" (R. 17; 65). Rushton, Wampler, and Jarvis thereupon formally decided to discharge the men (R. 16–17; 65–66). All seven men were notified that day (R. 13, 16–17; 28–29, 33, 55). No replacements were hired until sometime later (R. 16; 58).

B. The Board's conclusions and order

On these facts, the Board found, as did the Trial Examiner, that the walkout of the seven employees was a concerted activity in protest against the respondent's failure to supply adequate heat in their place of employment, and that it was thus protected by Section 7 of the Act. Accordingly, the Board concluded that the respondent's dismissal of the employees for engaging in the walkout was a violation of Section 8(a)(1) (R. 3, 18–19). In reaching this conclusion, the Board noted that the employees had

[4] In the meantime, the respondent's electrician had arrived, and the foreman and the night watchman had informed him that the furnace was mechanically inoperative (R. 49, 51). The electrician corrected the furnace malfunction, and it began to work properly at approximately 7:30 a.m. (R. 63). It was not, however, until noon that the temperature in the machine shop returned to normal (R. 56, 64, 96).

in the past complained to the respondent's foreman about the coldness in the plant; that the employees talked the matter over before the walkout; and that they had left the shop in protest over working conditions (R. 3).

The Board's order, insofar as here relevant,[4] required the respondent to cease and desist from the unfair labor practices; to offer reinstatement to the seven discharged employees; and to make them whole for any loss of wages which they may have suffered by reason of the respondent's discrimination against them (R. 4–5).

C. The decision of the court of appeals

The court below set aside the Board's order (R. 108–124) because none of the employees had, immediately prior to the walkout, made any specific request that the employer rectify the objectionable conditions in the plant. In the court's view, an "important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request

[4] The Board also found that the respondent violated Section 8(a)(5) of the Act by refusing to bargain collectively with the Industrial Union of Marine & Shipbuilding Workers of America, AFL–CIO, the certified bargaining representative of the respondent's employees (R. 72–73). This finding depends on the validity of the Section 8(a)(1) findings, since the Union's status as majority representative turns on the ballots cast in the Board election by four of the seven discharged employees. If the four employees were properly discharged prior to the election, they would not have been entitled to vote; if improperly discharged, they were entitled to vote.

made to the employer" (R. 118). Because the "company was afforded no opportunity to avoid the work stoppage by granting a concession to a demand of the employees" (R. 122), the court held that the employees' walkout was not a protected concerted activity.

Chief Judge Sobeloff, dissenting, was of the view that the Board's position "is neither unsupported by the record nor unreasonable * * * [since] the walkout of the seven employees constituted concerted activity protesting the unsatisfactory working conditions in the machine shop" (R. 124). He added that, "[w]hatever notice or demand upon the employer might be required in other circumstances * * * no additional notice or demand was necessary under the well supported findings of this case" (R. 124).

SUMMARY OF ARGUMENT

Section 7 of the National Labor Relations Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

A. 1. In delineating the scope of Section 7, the Board—mindful of the history and purpose of Section 7—has attempted to apply objective criteria which would avoid scrutiny of the fairness or unfairness, or wisdom or unwisdom of peaceful activities which are concerted in fact and do not violate any statutory prohibitions. Thus, the Board, with judicial approval, has denied the protection of Section 7 to employee group activity only where (1)

the objective of the activity would contravene the provisions or basic policies of the Act, or the provisions of a related federal statute, or (2) the means utilized to attain a lawful objective were indefensible by all recognized standards of conduct—such as major violence or similar misconduct, slowdowns, intermittent work stoppages, and the refusal to obey orders while drawing pay. Congress was aware of, and approved, these standards in amending the Act in 1947.

2. Seven employees left the plant in concert to protest the employer's repeated failure to supply adequate heat in the plant. Such a protest, which is the most elementary form of concerted action for "mutual aid or protection," is not inconsistent with the express provisions or basic policy of the Act, nor with the terms of any other federal statute.

3. Nor can it fairly be said that for employees to walk out without first making a demand on the employer to correct an objectionable condition is so indefensible as to warrant a forfeiture of the Act's protection. Where a working condition suddenly becomes intolerable, employees may not always find it possible to give advance notice before walking out, or they may consider a spontaneous walkout to be the most effective way of highlighting their grievance and putting pressure on the employer to alleviate it. Thus, the employees in the present case had complained for some time about the cold. On the morning of the walkout, conditions became so unbearable that even Foreman Jarvis remarked that, "[i]f those fel-

lows had any guts at all, they would go home." In these circumstances, the employees were amply justified in walking out without giving the employer a fresh opportunity to rectify the working conditions. The failure of the employees to make a demand upon the employer before walking out did not leave him in any doubt as to the reasons for the walkout or hamper him in attempting to bring the work stoppage to a quick end.

4. The conclusion that the walkout was protected under Section 7 is confirmed by the fact that the walkout was essentially similar to other types of spontaneous strikes which have uniformly been held protected by Section 7. See, *e.g.*, *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6), certiorari denied, 347 U.S. 976.

B. Even if there were an inconsistency between the policy of securing industrial peace by encouraging peaceful collective bargaining and the guarantee of full freedom in the exercise of the right to engage in concerted activities for the purposes of collective bargaining or of other mutual aid or protection, the primary responsibility for achieving an accommodation of these policies would rest with the National Labor Relations Board. In holding that respondent's employees were not engaged in concerted activities protected by the Act, the court below not only read into Section 7 an improper condition precedent, but it also erroneously substituted its judgment for that of the Board—the agency primarily charged with the implementation of the policies of the Act.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE WALKOUT BY THE EMPLOYEES TO PROTEST THE LACK OF ADEQUATE HEAT IN THE PLANT WAS CONCERTED ACTIVITY PROTECTED BY SECTION 7 OF THE ACT

Section 7 of the National Labor Relations Act guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) implements this guarantee by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In the present case, seven employees were discharged for peacefully walking out together in protest over the employer's repeated failure to supply adequate heat in the plant. Under these circumstances, the employee action was "concerted"; it was for the employees' "mutual aid or protection"; and the employer clearly "interfered with" or "restrained" the exercise of the activity by discharging the employees for it. The discharges therefore violated Section 8(a)(1).

The court below, however, withdrew statutory protection from an indisputably peaceful concerted activity because, in its judgment (see R. 120–121), the employees had not conducted themselves wisely and fairly in failing to discuss their grievance with the employer immediately prior to their walkout, although in fact they had complained of the working condi-

tions on prior occasions without avail. The court's introduction of such a highly subjective judgment into the interpretation of what constitutes "concerted activities" protected by Section 7 of the Act is contrary to the basic thesis of modern labor legislation; it is inconsistent with the principles which the Board, with judicial approval, has applied for many years in determining the scope of Section 7; and it involves the assumption by the court of a function which Congress has entrusted primarily to the expert judgment of the Board. The Board's conclusion that the employees did not forfeit their statutory protection by walking out, without first giving the employer a fresh opportunity to remedy the objectionable working conditions, was reasonable and proper.

A. The work stoppage did not lose its protected status under Section 7 merely because the employees failed to discuss their grievance with the employer immediately prior to the walkout

1. *The court's imposition of a condition precedent on the right to engage in concerted activity is contrary to the purpose and history of Section 7.*[6]—Prior to the 1930's, most courts treated the concerted action of employees to improve their working conditions as a tortious and enjoinable conspiracy whenever they regarded the means or objectives as "unlawful." The only standard of "lawfulness" was each judge's view of the desirability or undesirability of the activities

[6] See generally Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319 (1951).

in question.' The Norris-La Guardia Act sought to eliminate these subjective judgments from the federal courts' disposition of cases arising out of labor disputes. It specifically restricted the use of the injunctive process in such disputes, and declared "the public policy of the United States" to be that workers "shall be free from the interference, restraint, or coercion of employers of labor * * * in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *" (Sec. 2).[8] The guarantee of a right to engage in concerted activities provided by Section 7 of the National Labor Relations Act, which is couched in the same terminology as that utilized in

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[7] As Justice Brandeis pointed out in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 485 (dissenting opinion), concerted employee conduct "became actionable when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful." This concept later came under attack, for it "was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between workingman and employer; that due to this dependence upon the individual opinion of judges great confusion existed as to what purposes were lawful and what unlawful; and that in any event Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands" (*ibid.*).

[8] Describing the effect of the Norris-La Guardia Act, this Court stated in *United States* v. *Hutcheson*, 312 U.S. 219, 232: "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit * * * are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

the Norris-La Guardia Act (see *American News Co.*, 55 NLRB 1302, 1314 (dissenting opinion)), was intended further to insulate employees from the common law conspiracy doctrine (see *International Union, U.A.W.* v. *Wisconsin E. R. Bd.*, 336 U.S. 245, 257–258).

In giving effect to this labor history, the Board, with judicial approval, has attempted to avoid interpreting Section 7 in a manner which would invite scrutiny of the fairness or unfairness, the wisdom or unwisdom, or the desirability or undesirability of peaceful activities which are concerted in fact and do not violate clear statutory prohibitions. Under the Wagner Act, although the literal words of Section 7 could not be interpreted literally as immunizing all group activity, however conducted and without regard to its aim,[9] the exceptions were limited to situations in which (1) the objective of the activity contravened the provisions or basic policies of the Act, or the provisions of a related federal statute,[10] or (2) the means utilized to attain a lawful objective

[9] See *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (unlawful seizure of employer's property); *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U.S. 332 (strike in breach of collective bargaining contract); *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31 (strike which constituted mutiny under Criminal Code).

[10] *American News Co.*, 55 NLRB 1302 (strike to compel wage increase in violation of Wage Stabilization Act); *Thompson Products, Inc.*, 70 NLRB 13, vacated, 72 NLRB 886 (strike to compel employer to violate Board certification); *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199 (C.A. 4), and *National Labor Relations Board* v. *Brashear Freight Lines*, 119 F. 2d 379 (C.A. 8) (strike to compel employer to recog-

were "indefensible" [11] by all recognized standards of conduct. The latter category included, for example, major violence or similar misconduct,[12] slowdown,[13] intermittent work stoppages,[14] and the refusal to obey orders while drawing pay.[15]

In amending the Act in 1947, Congress was aware of and approved the principles which the Board and the courts of appeals were applying in defining the scope of Section 7.[16] Since 1947, the Board and the courts have continued to treat concerted activities as protected by Section 7, unless they were "unlawful" in their objective in the sense that the employees were seeking to compel the employer to violate a legal com-

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nize a minority union); *Sands Mfg. Co.*, *supra*, n. 9.

[11] *Harnischfeger Corp.*, 9 NLRB 676, 686.

[12] See *Fansteel* and *Southern Steamship* cases, *supra*, n. 9.

[13] *Underwood Machinery Co.*, 74 NLRB 641, 646–647.

[14] *International Union, U.A.W.* v. *Wisconsin E.R. Bd.*, 336 U.S. 245.

[15] *National Labor Relations Board* v. *Montgomery Ward & Co.*, 157 F. 2d 486 (C.A. 8); *C. G. Conn, Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390, 396–398 (C.A. 7).

[16] As this Court noted in *International Union, U.A.W.* v. *Wisconsin E.R. Bd.*, 336 U.S. 245, 260–262, the amendments proposed by the House sought to enumerate the types of activities from which statutory protection should be withdrawn. H.R. 3020, 80th Cong., 1st Sess., Sec. 12, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 204–207. In Conference, however, it was decided to retain Section 7 in its original broad form, as proposed by the Senate. The Conference Committee so concluded because "the courts have firmly established the rule that under the existing provisions of section 7 * * *, employees are not given any right to engage in unlawful or other improper conduct," and the Board in "its most recent decisions * * * has been consistently applying the principles established by the courts." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 38–39, Leg. Hist., pp. 542–543.

mand[17] or unless the means utilized involved major violence or misconduct,[18] or were otherwise plainly indefensible by all accepted standards of conduct.[19] They have continued to refuse to inquire into the wisdom or fairness of the employees' action.

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[17] *The Hoover Company* v. *National Labor Relations Board*, 191 F. 2d 380, 385–389 (C.A. 6) (boycott to compel employer to recognize one union while a representation petition filed by another union was pending before the Board); *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 24 47, 50–52 (C.A. 7) (strike to compel a wage increase which would have violated WSB regulations); *W. L. Mead, Inc.*, 113 NLRB 1040 (strike in breach of contract).

[18] *Victor Products Corp.* v. *National Labor Relations Board*, 208 F. 2d 834 (C.A. D.C.) (forcibly barring ingress to plant); *Hart Cotton Mills, Inc.*, 91 NLRB 728 (assault with deadly weapon); *Old Town Shoe Co.*, 91 NLRB 240 (breaking windows in nonstriker's home).

[19] *Elk Lumber Co.*, 91 NLRB 333, and *Farber Bros., Inc.*, 94 NLRB 748 (slowdown); *National Labor Relations Board* v. *Reynolds & Manley Lumber Co.*, 212 F. 2d 155 (C.A. 5) (walking off job in such manner as to create dangerous situation); *Carnegie-Illinois Steel Corp.*, 84 NLRB 851, affirmed, 181 F. 2d 652 (C.A. 7), and *U.S. Steel Co.* v. *National Labor Relations Board*, 196 F. 2d 459 (C.A. 7) (walking out without taking adequate steps to protect plant); *Montgomery Ward & Co.*, 108 NLRB 1175, and *Valley City Furniture Co.*, 119 NLRB 1589, 1594 (refusal to perform assigned work while drawing pay); *The Hoover Company* v. *National Labor Relations Board*, 191 F. 2d 380, 389–390 (C.A. 6) (conducting a boycott against the employer's product while drawing pay).

National Labor Relations Board v. *Local No. 1229, Electrical Workers*, 346 U.S. 464, falls within this category of indefensible conduct because of the union's failure to inform the public of any connection between the pending labor dispute and a published attack upon the employer's product. The Court accordingly found the attack "as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending." 346 U.S. at 477.

2. *The walkout was not inconsistent with the terms or policy of any federal enactment.*—Respondent's employees walked out to protest respondent's failure to supply adequate heat for the plant. Such a protest, which is the most elementary form of concerted activity for mutual aid or protection, is not inconsistent with the express provisions or basic policy of the Act, nor with the terms or policy of any other federal statute.

In setting aside the Board's order, the court below held (R. 118) that an "important and necessary qualification of the right to exert pressure on an employer through work stoppages is that such pressure be exerted in support of a demand or request made to the employer." The court sought to derive support for this conclusion from the policy of the Act "to secure industrial peace and prevent strife and disruption by encouraging negotiation and peaceful procedure for the attempted settlement of the demands of a party" (R. 117).

Although Section 1 of the Act declares the public policy of the United States to be to encourage "the practice and procedure of collective bargaining," this provision does not authorize a court to impose upon employees the duty of conducting themselves in whatever way that tribunal thinks will be conducive to industrial peace. Nor does it authorize a court to qualify rights granted by the Act by imposing conditions precedent which the court believes are prerequisites to sound collective bargaining. The statute itself declares the congressional plan for encouraging collective bargaining and advancing industrial peace, and

the statute itself creates the rights and obligations. A major part of the policy of encouraging the practice and procedure of collective bargaining was the more specific intention of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (Sec. 1). Sections 7 and 8(a)(1) furnish this protection by forbidding interference with "the right * * * to engage in other concerted activities for the purpose of * * * mutual aid or protection." Nothing in the Act requires advance notice or negotiations with the employer as a condition precedent to engaging in a strike or spontaneous work stoppage, except under special circumstances arising under an existing collective bargaining agreement." On the contrary, Section 501(2) of the Labor Management Relations Act defines the term "strike" very broadly to include "any strike or other concerted stoppage of work by employees * * * and any concerted slow-down or other concerted interruption of operations by employees." And Section 13 of the National Labor Relations Act, as amended, expressly provides that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to

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[20] Where there is a collective bargaining contract, Section 8 (d) requires a 60-day notice of contract termination or modification, during which time the parties are precluded from "resorting to strike or lock-out." See *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282.

strike * * *." See *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665, 672–673; *National Labor Relations Board* v. *Drivers, Local 639*, 362 U.S. 274, 282.[a]

3. *The employees were not required to discuss their grievance with the employer prior to the walkout.*— For employees to walk out without first making a demand on the employer to correct an objectionable condition is not so indefensible, when evaluated in the light of industrial realities and the possible injury to employer interests, as to warrant a forfeiture of the Act's protection. At the time of the walkout, the employees had no bargaining representative; nor was there a collective bargaining agreement in effect which prescribed a grievance or other procedure for promptly processing or adjusting grievances.

In addition, where a working condition suddenly becomes intolerable, it may not always be possible for the employees to give advance notice before walking

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[a] In concluding that "the office of a demand [is] a condition upon the use of concerted pressures," the court below relied (R. 118) on *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134, 138 (C.A. 4), where the court, in rejecting the contention that strikers lost their employment status by not returning to work when the plant was reopened, noted that "strike" was defined as "'the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused.'" But, the court in *Jeffery-De Witt* was merely referring to one of the many definitions given to the term "strike" at common law, and was not holding that the term was necessarily that limited for purposes of the Act. Similarly, the definition in the Restatement of *Torts*, Sec. 797, also relied on by the court below (R. 118, n. 8), does not apply to the Act. See also *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. 2d 202, 205 (C.A. 2), affirmed, 313 U.S. 177.

out. Even if the employees could select a more prudent or desirable method for achieving their objective—such as awaiting repairs to defective equipment (see R. 119) rather than walking out in concert—the work stoppage is nevertheless protected under Section 7." Thus, even where notice to the employer is possible, the employees may nevertheless believe that a spontaneous work stoppage is the most effective means of emphasizing the seriousness of their grievance and of exerting the maximum pressure on the employer to alleviate it.

The facts of the present case illustrate this point. The employees had been complaining for some time about the lack of adequate heating facilities and the cold in the shop during the winter months. As detailed in the Statement, *supra*, pp. 3–4, one employee had remarked to President Rushton and other company officials about the coldness in the shop, and another employee had complained to Foreman Jarvis about the insufficient heat coming from the main furnace. Employee Caron testified that, just two weeks prior to the walkout, all of the men had complained to Jarvis about the "cold and miserable" conditions

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"See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 344; *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 636 (C.A. 2). The court below stressed the fact that, at the time of the walkout, the respondent already had the furnace repaired and functioning, and that, had the employees made a demand, they would have ascertained this fact or possibly would have obtained some other adjustment (R. 119). But even the court acknowledged that "the shop was undeniably cold at the time the men left" (R. 119), and the record shows that the temperature did not return to normal until noon—about 4½ hours after the walkout (see n. 4, *supra*, p. 5).

in the shop. On the morning of the walkout, the shop was so cold that an icicle had formed in a drainpipe of a spot welder and the employees were walking about all "huddled" up and "shaking." Foreman Jarvis was impelled to state, "If those fellows had any guts at all, they would go home." In these circumstances, the employees could well have believed that they had given the employer so much notice about the problem in the past that he was not entitled to a fresh opportunity to rectify the condition and, if results were to be obtained, more dramatic steps should be taken. As one employee testified, "[W]e had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." Besides, conditions on the morning of the walkout were so intolerable that any thought of work seemed to be out of the question; it was natural to think only of retiring, temporarily, to a warmer shelter away from the plant—a suggestion which Foreman Jarvis made himself.

The failure of the employees to demand more heat before walking out did not leave the employer in any doubt as to the reasons for the walkout or hamper him in attempting to bring the work stoppage to a quick end. The history of prior complaints and the conditions on the morning of the walkout made obvious the reason for the walkout. Employee Caron told Jarvis that he was leaving because it was "too cold" (R. 13, 28). Both Jarvis and General Foreman Wampler admitted knowledge of the reason for the walkout at the time they participated in the

decision to discharge the men (R. 53–54, 58, 61). As Wampler testified, the "first step that I took [on arriving at the plant] was to find out why [the employees walked out], and I was informed that it was 'too cold' " (R. 61). In this situation, it would exalt form over substance to conclude that the employer could not be expected, absent a formal demand by the employees, to know why they walked out and what he would have to do in order to get them to return.[21] Just as promptly as he decided to discharge them for their action, the employer could have assured them that the furnace was repaired and that the plant was warming up, and he could have appealed to them to return to work, at least by afternoon. Since the employees had no intention of staying out for a prolonged period (R. 28, 34, 36, 55, 90, 98), the employer, had he followed that course, would in all probability have persuaded them to return without an undue loss of production. Instead, he took the drastic action of discharging the employees—an action all out of proportion to what was required to remedy the problem confronting him.

In this setting, the Board properly concluded that it was not unreasonable for the employees to resort to economic pressure without first making a formal demand upon the respondent to rectify the cold working conditions. The Board's determination was thus entitled to stand and the court below was not warranted in substituting its own independent

[21] Cf. *International Ladies' Garment Workers' Union* v. *National Labor Relations Board* (*Walls Mfg. Co.*), No. 16124 (C.A.D.C.), January 25, 1962, 49 LRRM 2483, 2484.

judgment that the employees left their jobs with "no reasonable justification" (R. 122)."

4. *The walkout was essentially similar to other spontaneous strikes which have uniformly been held protected by Section 7.*—The Board's conclusion that the walkout here was protected by Section 7 is confirmed by the fact that the walkout was essentially similar to other spontaneous strikes which have uniformly been held protected by Section 7. In *National Labor Relations Board* v. *Southern Silk Mills, Inc.*, 209 F. 2d 155 (C.A. 6), certiorari denied, 347 U.S. 976, the court held that "the spontaneous walk-outs and temporary work stoppages by the respondent's employees

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" The discharges cannot be justified because the walkout was allegedly in violation of an unwritten (R. 95) company rule against leaving the job without permission (R. 129). If the walkout be protected concerted activity under Section 7, any company rule purporting to bar the activity would have to give way to the statute. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793. Accordingly, the discharge would not be "for cause" within the meaning of Section 10(c) of the Act, which provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." As Senator Taft pointed out, this provision "merely states the present rule" (93 Cong. Rec. 6518-6519); that is, where an employee is discharged for reasons condemned by the Act, the Board is to afford a remedy, but where the discharge is for some other reason, the Board is not to provide a remedy. See *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 974 (C.A. 4); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 690, 692 (C.A. 2); *National Labor Relations Board* v. *Eastern Mass. Street Railway Co.*, 235 F. 2d 700, 709 (C.A. 1); *National Labor Relations Board* v. *Carolina Mills, Inc.*, 167 F. 2d 212, 213 (C.A. 5). "In every case it is a question of fact for the Board to determine" (93 Cong. Rec. 6518).

in protest against what they not unreasonably considered excessive heat in the factory building constituted concerted activity for mutual aid or protection within the meaning of Section 7 of the National Labor Relations Act." In *National Labor Relations Board* v. *Solo Cup Co.*, 237 F. 2d 521 (C.A. 8), a group of employees suddenly, and without prior warning, shut down their machines to protest to management the discharge of a co-worker. The court held the action protected, stating (237 F. 2d at 526): "The employees might well have exercised better judgment by sending a committee to the management at a more convenient time for making their protest and demand, but we are unable to conclude that ill judgment or lack of consideration add up to illegality." Similarly, in *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3), the employees spontaneously gathered during working hours and sought to present their grievances to the employer, but without avail. The court declared (182 F. 2d at 819) that "[w]hat occurred in this case was certainly * * * the kind of activity which is expressly protected by Section 7 * * *," and added that "the statute would have protected them against interference or coercion if instead of insisting upon immediate discussion of their demands they had then and there left the plant and formed a picket line outside."[20]

[20] Accord, *National Labor Relations Board* v. *J. I. Case Co.*, 198 F. 2d 919, 922 (C.A. 8), certiorari denied, 345 U.S. 917; *Modern Motors, Inc.* v. *National Labor Relations Board*, 198 F. 2d 925, 926 (C.A. 8); *National Labor Relations Board* v. *Cowles Publishing Co.*, 214 F. 2d 708 (C.A. 9), certiorari denied, 348 U.S. 876; *National Labor Relations Board* v. *Knight Morley*

That the protection of Section 7 is not limited to situations where the employer has first been afforded an opportunity to adjust the employees' grievance is further shown by the cases which hold that a discharge of employees who are in fact engaged in concerted activity is unlawful even when the employer had no knowledge of that activity, or even when, if he did, he was mistaken as to its protected character.[26] In some of these cases, as the court below noted (R. 120), the grievance may have been discussed with the employer prior to the work stoppage. None of the decisions turned on this factor, however. The decisions rested, rather, on the broad ground that the Act does not require employees to go through any formality before they may take concerted action for their mutual aid and protection.[27]

Corp., 251 F. 2d 753 (C.A. 6), certiorari denied, 357 U.S. 927; *Gullet Gin Co.* v. *National Labor Relations Board*, 179 F. 2d 499 (C.A. 5), reversed on other grounds, 340 U.S. 361.

[26] See *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C.A. 4), certiorari denied, 332 U.S. 758; *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902 (C.A. 9), enforcing 97 N.L.R.B. 820, 823; *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902–903 (C.A. 3); *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. 2d 87, 90–93 (C.A. 4), certiorari denied, 347 U.S. 935.

[27] *National Labor Relations Board* v. *Ford Radio & Mica Corp.*, 258 F. 2d 457 (C.A. 2), is not to the contrary, as the court below seems to have assumed (R. 120). There, unlike here, the circumstances were such as to afford the management no inkling as to the reason for the strike, and its repeated efforts to ascertain the reason from the strikers were met with evasion. (See R. 125, n. 1, Sobeloff, C.J., dissenting.) The Second Circuit carefully distinguished cases of spontaneous strikes in which "the circumstances were such that the management must have known the issues" (258 F. 2d at 464).

B. The court of appeals erred in substituting its judgment for that of the National Labor Relations Board

In holding that respondent's employees were not engaged in concerted activities protected by the Act because they had not satisfied the "important and necessary qualification of the right to exert pressure on an employer through work stoppages * * * that such pressure be exerted in support of the demand or request made to the employer" (R. 118), the court below not only read into Section 7 an improper condition precedent, but it also erroneously substituted its judgment for that of the agency primarily charged with the implementation of the policies of the Act. For reasons already stated (*supra*, pp. 16–17), we think that Congress found no inconsistency between the policy of securing industrial peace by encouraging peaceful collective bargaining and the guarantee of full freedom in the exercise of the right to engage in concerted activities for the purposes of collective bargaining or of other mutual aid or protection. Even if some inconsistency were thought to exist, the primary responsibility for achieving an accommodation would rest with the National Labor Relations Board. For while affording an employer an opportunity to rectify objectionable working conditions before resorting to a strike may often advance the aim of encouraging collective bargaining, to impose that condition automatically in every case not only may impinge upon the competing policy of safeguarding the employees' rights to engage in concerted activity for mutual aid or protection but also in the long run

may interfere with the development of sound collective bargaining relations. In some cases the issue might come down to whether the employer had had notice enough, or to whether the conditions were so aggravated that no notice could fairly be required. In any event the ultimate problem, as in *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87, 96, involves "the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." See also *National Labor Relations Board* v. *Local No. 1229, Electrical Workers*, 346 U.S. 464, 480 (dissenting opinion). Congress could not spell out in advance all the activities protected by Section 7; it met this difficulty by leaving the adaptation of means to end to the empiric process of administration. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194. Since "the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially," the Board's determination is to be accepted "if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131.

In the present case the Board's ruling that the employees' conduct constituted protected concerted activity satisfied these criteria and should have been accepted by the court of appeals.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with directions to enforce the Board's order in full.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

SAMUEL M. SINGER,
LEE M. MODJESKA,
Attorneys,
National Labor Relations Board.

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APPENDIX

The relevant provisions of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*, are as follows:

SEC. 1. * * *

* * * * *

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

SEC. 10(c) * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

The relevant provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. 141, *et seq.*, are as follows:

> SEC. 501. When used in this Act—
>
> * * * * *
>
> (2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.
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